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January 29, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND-DELIVERED

Ms. Magalie Roman Salas
Secretary
FEDERAL COMMUNICATIONS COMMISSION
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, FCC 97-342, released October 16, 1997 (*Second Report and Order* in WT Docket No. 97-82) ["*Order*"] -- *Ex Parte* Communication

Dear Madam Secretary:

On January 29, 1998, Lawrence R. Sidman and Eric T. Werner of Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, and Robert L. Pettit of Wiley, Rein & Fielding, representing ClearComm, L.P.; the Chairman of ClearComm's Board of Directors, Fred H. Martinez; and its Senior Vice President and General Counsel, Tyrone Brown, met with Commissioner Gloria Tristani and the Commissioner's Legal Advisor, Karen Gulick. The meeting concerned the pending petitions for reconsideration of the above-referenced Commission *Order*, and the timing of the date for licensee elections under that *Order*.

The substance of this meeting is reflected in the attached three page issue synopsis which was distributed at the meeting. In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, an original and one copy of this letter and the written *ex parte* presentation submitted on behalf of ClearComm are being filed with your office.

Kindly stamp and return to the courier the receipt copy of this letter designated for that purpose. You may direct any questions concerning this matter to the undersigned.

Respectfully submitted,

Eric T. Werner

Enclosure

cc: Commissioner Gloria Tristani (w/o encl.)
Karen Gulick, Esquire (w/o encl.)

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ClearComm

January 29, 1998

Re: *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, FCC 97-342, released October 16, 1997 (*Second Report and Order* in WT Docket No. 97-82)

Following a six-month proceeding during which it received input from all interested parties and carefully considered the difficult dimensions of the C block financing dilemma, the Commission, in the *Second Report and Order* ("*Order*"), adopted a menu of measures designed to respond to the capital crisis facing many C block small business licensees while also protecting the fairness and integrity of the Commission's auction processes. As a general matter, the Commission's remedial plan represents a reasonable compromise in the face of extraordinarily difficult circumstances. However, in two very narrow but nevertheless critical respects, the *Order* needs to be modified to ensure fundamental fairness and the ability of the licensees to avail themselves of these options.

As discussed more fully in the attachment, the *Order* first needs to be changed to eliminate the 50 percent down payment forfeiture applicable to licensees electing the disaggregation option. Elimination of the penalty is warranted because the Commission failed to provide a compelling rationale to support it and closer examination reveals that the penalty actually serves to undermine the objectives of Section 309(j) of the Communications Act. Perhaps more importantly, however, the change is necessary as a practical matter to restore commercial reasonableness to the disaggregation option. Without the change, the onerous burden created by the forfeiture will simply place the disaggregation option out of reach of many licensees who will have little alternative but to turn to the bankruptcy court for relief.

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Second, the *Order* should be changed by extending the date for licensees to make their election and payments for an additional calendar quarter -- from February 26 until June 1, 1998. This change is necessary from an equitable standpoint to place licensees electing the prepayment option on an equal footing with those electing disaggregation or invoking the "built-out" exception under the amnesty option. Moreover, by affording licensees an additional three months to arrange financing, the change should increase the number of licensees who could take advantage of the prepayment option, thus increasing the number of present high bids which are paid off in full to the Commission and again reducing the probability of a wave of bankruptcies which serves only to delay deployment of new competitive services to American consumers.

THE DOWN PAYMENT FORFEITURE PENALTY ON DISAGGREGATING SMALL BUSINESSES SHOULD BE ELIMINATED

On reconsideration of the *Second Report and Order* ("*Order*"), the FCC should eliminate the penalty requiring a small business licensee electing the disaggregation option to forfeit 50 percent of its down payment presently on deposit with the Commission. This single, narrowly targeted change is not a material departure from the Commission's *Order* and would not harm the integrity of the auction process, but it is indispensable to making the disaggregation option viable as a business matter and sustainable as a legal matter. Instead, the Commission should permit disaggregating licensees to apply all their down payment funds toward their outstanding interest obligations to the Commission.

The Order *Provides No Analytical Support For The Forfeiture*

The *Order* recited no rationale to support imposition of any forfeiture on licensees electing disaggregation. Unlike the amnesty and prepayment options, disaggregation does not implicate default in any way: The FCC will still receive full payment at the net high bid price pro-rated for the licensee's retained spectrum. Moreover, the disaggregating licensee will still serve each and every market it won in the auction unlike licensees electing amnesty or prepayment who will abandon entire markets. Finally, disaggregation presents no risk of unfairness or "gaming" of future auctions like amnesty or prepayment do. It merely extends a practice already permitted by the FCC's rules to which no penalty attaches.

The Forfeiture Undermines The Pro-Competitive Goals Of Section 309(j) And The Order *And Is Commercially Unreasonable*

Requiring disaggregating small PCS providers who want to serve all of the markets they won at auction to forfeit critical capital they have already raised conflicts with objectives which form the very cornerstone of the C block: ensuring that small and minority-owned businesses have a meaningful opportunity to participate in the telecommunications sector; encouraging rapid build-out of wireless service; and facilitating the emergence of genuine competition in the marketplace. Unless eliminated, the forfeiture would wrest from ClearComm $17 million in funds needed to finance the buildout of its PCS systems. This loss would compel ClearComm to raise that capital a second time in financial markets which are now far less receptive to wireless investment than they were at the time of the C block auction.

As both lender and regulator in this case, the FCC bears a duty to weigh in its public interest analysis the commercial reasonableness of its actions just as any other commercial lender would do in similar circumstances. In a loan "work-out" like this, the objective is to achieve a debt restructuring plan which both satisfies the lender's need for repayment and preserves the value of the debtor's assets and its ability to continue as a going concern able to meet its payment obligations. Here, as a majority of Petitions make clear, the FCC's command that disaggregating licensees forfeit half of their often substantial down payments, while retaining all of their licenses and providing service to all of their markets, undermines the viability of the disaggregation option and increases the likelihood of a wave of C block bankruptcies. By contrast, permitting disaggregating licensees to apply their residual down payment funds toward their outstanding interest obligations will enable these small start-up companies to direct their fundraising toward market build-out, thereby speeding deployment of new, competitive services to consumers.

In No Event Should Disaggregation Be Penalized More Harshly Than Prepayment

If the Commission nevertheless decides to preserve some forfeiture for small businesses electing disaggregation, the amount of the penalty should be reduced. The 50 percent forfeiture for disaggregation far exceeds the 30 percent forfeiture applied to the prepayment option. Such harsher treatment for disaggregation is legally unsustainable. If any penalty is retained, it should be reduced to the functional equivalent of the prepayment forfeiture, no more than 30 percent of the residual down payment funds (*i.e.*, 15 percent of the total down payment).

THE COMMISSION SHOULD FURTHER POSTPONE UNTIL JUNE 1, 1998, THE DATE FOR LICENSEES TO MAKE THEIR ELECTIONS AND PAYMENTS UNDER THE *SECOND REPORT AND ORDER*

At present, under the *Order* licensees who continue to pay on their existing debt obligations; those which elect the disaggregation option; and those which invoke the "built-out" exception under the amnesty option are not obligated to make the payments required under those options until March 31, 1998. The *Order* further notes that the Commission's default rules afford these licensees an additional 60-day grace period before any delinquent payments would be declared to be in default. By contrast, although the *Order* anticipates that licensees electing the prepayment option will be securing additional private funds to make supplemental payments to the Commission toward the pre-paid purchase of their licenses, the *Order* demands that licensees electing prepayment make any such supplemental payments on February 26, 1998 an entire month before payment is required from licensees electing any of the other options. Moreover, the *Order* provides no similar grace period for these licensees. This three-month disparity between the payment deadline for prepaying licensees and the deadline for all other licensees is grossly inequitable and places licensees electing prepayment at a competitive disadvantage relative to other licensees. There is no sound basis for this disparate treatment.

To restore equity and competitive neutrality to the menu of options in the *Order*, the Commission should further postpone the deadline for all licensees to make their elections for one calendar quarter -- from February 26 until June 1, 1998 -- and should suspend the grace period rule to require that all C block licensees make any required payments with respect to their elections on that date. Such a change would in no way disadvantage licensees who elect to proceed under any of the first three options because, as noted above, these licensees are already permitted to defer any payment due to the Commission until that date. Similarly, the Commission would experience no hardship as a result of an additional postponement and would, in fact, derive substantial benefits from it.

First, the delay would entail only an additional three months of interest on licensees' outstanding debt, a negligible amount in terms of the overall obligations of the licensees for which the licensees will, in any event, remain liable to the Commission. Second, the deferral would facilitate licensees' ability to pursue the prepayment option by affording them an additional three months to arrange the outside financing they would require to prepurchase a greater number of their licenses. Prepayment clearly works to the Commission's advantage, and serves the public interest, because licensees' present net high bids in respect of the pre-paid markets are paid off in full and relieves the Commission of its ongoing responsibilities as a lender. By facilitating licensees' ability to opt for prepayment, the Commission maximizes its recovery of revenues from the original C block auction and accelerates the deployment of new competitive services to consumers.